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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

**IN RE GRAND JURY
INVESTIGATION**

**Case No.: SA CR 08-00139 CJC
ORDER DENYING [REDACTED]
MOTION TO SHOW CAUSE**

Introduction

[REDACTED]

Motion to Show Cause for Violating Rule 6(e)

Dr. Nicholas also moves for an order to show cause with respect to an alleged violation of Rule 6(e) which provides that an attorney for the government, or any person to whom disclosure is made under paragraph (e)(A)(ii), “must not disclose a matter occurring before the grand jury” FED. R. CRIM. P. 6(e). Dr. Nicholas alleges that secret information pertaining to the identity of grand jury witnesses and the direction of the grand jury’s investigation were leaked by government attorneys, particularly AUSA Stolper, to the *Wall Street Journal* and the *Los Angeles Daily Journal*. The alleged leak

1 to the *Wall Street Journal* resulted in a July 13, 2007 article entitled “Broadcom Options
2 Probe Shifts to Ex-CEO” which reported the following:

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4 The federal agents are also looking at whether Mr. Nicholas and his
5 companies illegally structured transactions to evade currency-reporting
6 requirements, according to people familiar with the situation.

7 (Weingart Decl. ¶ 31, Exh. K.) The alleged leak to the *Los Angeles Daily Journal*
8 resulted in a series of telephone calls from reporter Gabe Friedman to counsel for
9 individuals served with grand jury subpoenas and to counsel for Dr. Nicholas inquiring
10 about the government investigation’s interest in currency structuring.¹ (*Id.* at ¶ 18-20.)
11

12 Before this Court may order a show cause hearing on a possible breach of grand
13 jury secrecy, Dr. Nicholas must establish a *prima facie* violation of Rule 6(e). *Barry v.*
14 *United States*, 865 F.3d 1317, 1321 (D.C. Cir. 1989). A *prima facie* violation is
15 established when the moving party puts forward evidence that “the media reports
16 disclosed information about matters before the grand jury and indicated that the sources
17 of the information included attorneys and agents of the government.”² *Id.* (*quoting*
18 *United States v. Eisenberg*, 711 F.2d 959, 963 (11th Cir. 1983)) (internal quotations
19 omitted). To determine if the moving party has established a *prima facie* violation, a
20 court must, at the least, examine (1) whether matters occurring before the grand jury have
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22 ¹ Mr. Friedman’s article appeared in the *Los Angeles Daily Journal* on July 30, 2007, but it does not
23 appear that Dr. Nicholas argues it serves as an independent basis for a show cause hearing. Instead, Dr.
24 Nicholas relies only on the pre-article telephone calls placed by Mr. Friedman as evidence of the leak.
(*See Mtn.* at 10 n.7.)

25 ² Dr. Nicholas argues that his burden in establishing a *prima facie* violation of Rule 6(e) is “relatively
26 light.” (*See Mtn.* at 12.) In *In re Sealed Case No. 98-3077*, the District of Columbia Circuit recognized
27 that the evidentiary burden with respect to media reports is “relatively light” in so far as a party may
28 simply submit the media report itself as its *prima facie* case. *See* 151 F.3d 1059, 1067-68 & n.7 (D.C.
Cir. 1998). The court, however, in no way lessened the moving party’s obligation to present a
disclosure regarding matters occurring before the grand jury or attributing such information to a
prohibited source. *See id.* Dr. Nicholas is correct however in stating that the media report may
sufficiently implicate a prohibited source based on the nature of the information disclosed alone. *Id.* at
1068 n.7.

1 been disclosed; (2) whether the disclosure implicates a prohibited source under Rule
2 6(e)(2); and (3) evidence presented by the government to rebut allegations of the
3 violation.³ *See United States v. Rioux*, 97 F.3d 648, 662 (2d Cir. 1996); *In re Grand Jury*
4 *Investigation (Lance)*, 610 F.2d 202, 218 (5th Cir. 1980); *see also United States v.*
5 *Flemmi*, 233 F.Supp.2d 113, 119 (D. Mass. 2000) (ordering the government to submit
6 affidavits in response to the moving party's showing of a Rule 6(e) violation). Dr.
7 Nicholas has failed to establish a *prima facie* violation because (1) the *Wall Street*
8 *Journal* article and Mr. Friedman's telephone calls did not disclose matters occurring
9 before the grand jury; (2) there is insufficient evidence that governmental officials were
10 the source of the *Wall Street Journal's* or Mr. Friedman's information; and (3) the
11 government has submitted evidence sufficient to rebut any inferences of governmental
12 involvement.

13
14 **(1) The Media Reports Do Not Reveal Matters Occurring Before the Grand
15 Jury**

16 To violate Rule 6(e), a media report must disclose secret details about what has
17 transpired in the grand jury room. *United States v. Dynavac*, 6 F.3d 1407, 1413 (9th Cir.
18 1993); *In re Grand Jury Investigation*, 920 F.2d 235, 241 (4th Cir. 1990); *see also*
19 *Flemmi*, 233 F.Supp.2d at 116. Because government investigations are free from Rule
20 6(e)'s secrecy requirement and often closely relate to grand jury investigations, courts
21 strictly require that the disclosure implicate the grand jury's actual or intended conduct.⁴

22
23 ³ Dr. Nicholas argues that the Court should not consider the government's rebuttal evidence when
24 assessing the *prima facie* case under *United States v. Rosen*, 471 F. Supp. 2d 651 (E.D.Va. 2007). In
25 *Rosen*, the District Court merely quoted the definition of "*prima facie*" from Black's Law Dictionary but
26 cited no case law in support of reviewing only the moving party's submissions in the Rule 6(e) context.
27 *Id.* at 656. This Court finds more compelling the analysis adopted by the District of Columbia and Fifth
28 Circuit Courts of Appeal, cited above, which considers rebuttal evidence in assessing whether a show
cause hearing is justified under the circumstances.

⁴ Matters occurring before the grand jury include events which have already transpired before the grand
jury, including witness testimony, events which are likely to occur, such as the identity of future
witnesses, and the strategy and direction of the grand jury investigation. *See Lance*, 610 F.2d at 216-17;
In re Sealed Case No. 99-3091, 192 F.3d at 1001. The District of Columbia Circuit cautioned that
disclosures about the strategy or direction of the grand jury should not be applied broadly and is only a

1 *See In re Sealed Case No. 99-3091*, 195 F.3d 995, 1002 (D.C. Cir. 1999); *Rosen*, 471
2 F.Supp.2d at 655 (finding that a *prima facie* case was not established because the
3 disclosure named no grand jury witness, disclosed no questions asked or to be asked of
4 grand jury witnesses, summarized no grand jury testimony and did not mention the grand
5 jury investigation). A less exacting inquiry would impose a “veil of secrecy . . . over all
6 matters occurring in the world that happen to be investigated by a grand jury.” *In re*
7 *Sealed Case No. 99-3091*, 195 F.3d. at 1001-02.

8
9 The media reports presented by Dr. Nicholas do not sufficiently implicate matters
10 occurring before the grand jury. The *Wall Street Journal* article does not establish a Rule
11 6(e) violation because it does not disclose what has transpired or will transpire before the
12 grand jury. *See Dynavac*, 6 F.3d at 1413. The article revealed an avenue of
13 investigation, currency structuring, pursued by federal agents. (*See Weingart Decl.* ¶ 31,
14 Exh. K.) This alone does not disclose or suggest any past or current activity within the
15 grand jury room. Nor does it disclose the identity of witnesses or nature of testimony
16 occurring before the grand jury. Dr. Nicholas argues that the article disclose the strategy
17 and direction of the grand jury’s investigation. (Mtn. at 13.) Alleged disclosure of the
18 grand jury’s strategy or direction must be evaluated in light of the rule’s text, which
19 limits its application to matters “occurring before” the grand jury. *See In re Sealed Case*
20 *No. 99-3091*, 192 F.3d at 1002. The disclosure of the direction of a federal investigation
21 “coincidentally before the grand jury [which can] be revealed in such a manner that its
22 revelation would not elucidate the inner workings of the grand jury is not prohibited.” *Id.*
23 (*quoting Senate of P.R. v. United States Dep’t of Justice*, 823 F.2d 574, 582 (D.C. Cir.
24 1987) (internal quotations omitted); *Rioux*, 97 F.3d at 662 (describing media reports
25 which discuss federal investigations without actually disclosing matters before the grand
26 jury). There is no evidence that the government investigation and the grand jury

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28 violation when it elucidates the inner workings of the grand jury. *In re Sealed Case No. 99-3901*, 192
F.3d at 1002.

1 investigation were ‘indiscriminately merged’ so that all government investigatory efforts
2 were a *de facto* exercise of grand jury authority.⁵ *See In re Grand Jury Subpoena*, 920
3 F.2d at 243.

4
5 Similarly, the telephone calls by Mr. Friedman do not reveal matters occurring
6 behind the doors of the grand jury room. According to Dr. Nicholas’ counsel, Mr.
7 Friedman’s telephone calls referenced only a government investigation and did not allude
8 to any activity that had or will transpire before the grand jury. (*See Weingart Decl.* ¶ 18
9 (“Mr. Friedman said that he understood the attorneys were representing individuals in
10 connection with a *government investigation . . .*”); ¶ 19 (“Mr. Friedman . . . called me
11 and asked for comment regarding his understanding that the *government was now*
12 *investigating* ‘financial transactions unrelated to Broadcom’); *cf.* Weingart Decl. ¶ 20
13 (“[T]he article discloses the *government’s ‘structuring’ investigation* of Dr. Nicholas’s
14 business entities.”)) (emphases added). The Court is not persuaded that inferences drawn
15 from the timing of individual counsels’ calls to AUSA Stolper and Mr. Friedman’s calls
16 to the same parties is sufficient to establish that Mr. Friedman was privy to secret grand
17 jury information rather than simply information about the government’s parallel
18 investigation. *See In re Sealed Case No. 99-3091*, 192 F.3d at 1002; *Rioux*, 97 F.3d at
19 662.

20
21 **(2) The Media Reports Do Not Implicate a Prohibited Source**
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25 ⁵ Dr. Nicholas argues that a government investigation is only independent of a grand jury investigation
26 when “no grand jury activity has yet occurred, or ever does occur.” (Reply at 4.) This overlooks the
27 contemporary realities of complex federal criminal investigations. Government and grand jury
28 investigations often occur simultaneously, with governmental investigatory work serving as the basis of
a separate grand jury proceeding. Any categorical rule requiring a temporally distinct government
investigation is unworkable. The approach of the Fourth Circuit, considering whether the investigations
were indiscriminately merged or whether the government investigator acted as an agent of the grand
jury, is a more appropriate and manageable test. *See In re Grand Jury Subpoena*, 920 F.2d at 243.

1 The *Wall Street Journal* article, which only references “people familiar with the
2 situation,” does not sufficiently establish that a prohibited party is the source of the leak.
3 (Weingart Decl. ¶ 31, Exh. K.) Dr. Nicholas argues that the article’s attribution alone is
4 susceptible to an interpretation that a prohibited party provided the information despite
5 the ambiguous sourcing. However, “[t]he inability to show a definite source for some of
6 the information contained in the article[] might cause a *prima facie* case to fail if a
7 responsive affidavit denying the allegations is made.” *Lance*, 610 F.2d at 219. Here, the
8 government has presented declarations rebutting any inference that may be drawn from
9 the article’s vague attribution. *See supra*, part 3. This evidence is also sufficient to rebut
10 any inference that may be drawn from the similar phrasing in previous *Wall Street*
11 *Journal* articles that disclosed non-Rule 6(e) information provided by AUSA Stolper.
12 (See Mtn. at 15; Weingart Decl. ¶ 5, Exh. B.)

13
14 Mr. Friedman’s telephone calls also do not identify a prohibited party as the source
15 of his information. In contrast to the *Wall Street Journal* article which specifically
16 attributes information to governmental personnel, Mr. Friedman neither attributed nor
17 implied the information was provided by any particular source, let alone a prohibited one.
18 (See Weingart Decl. ¶¶ 18-20.) Inferences drawn from the timing of Mr. Friedman’s
19 calls are again insufficient to establish that the disclosure was from a prohibited source.
20 The government has put forward sufficient evidence to rebut any inference that may be
21 drawn from the timing of Mr. Friedman’s calls. *See Lance*, 610 F.2d at 219.

22 23 **(3) The Government Has Rebutted Any Inference of a Prohibited Leak**

24 The government also has submitted *in camera* evidence sufficient to rebut any
25 inference that a prohibited party was responsible for the alleged leak.⁶ In *Lance*, the Firth

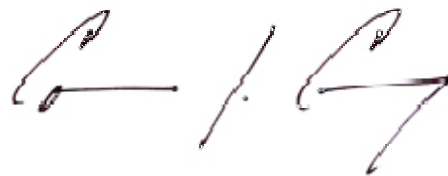
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27 _____
28 ⁶ Dr. Nicholas objects to the government’s *in camera* submission of AUSA Stolper’s declaration,
arguing that due process requires that he be afforded an opportunity to see and contest the government’s
evidence. The Court disagrees. AUSA Stolper is permitted to submit secret grand jury information to
the Court *in camera* to rebut the inference of an illegal leak. Because that submission contains both

1 Circuit explained that the government’s rebuttal evidence must be considered because the
2 Court accepts as true the disclosure and attribution reported by the press account. 610
3 F.2d at 219-20. Moreover, as this evidence would certainly be presented at any show
4 cause hearing, it is appropriate to consider the evidence at this juncture to avoid
5 unnecessary proceedings. To that end, the government has submitted affidavits from the
6 Assistant United States Attorneys and FBI Agents involved in the investigation
7 categorically denying disclosing grand jury information to the media. (See Stolper Decl.
8 ¶ 2; Julian Decl. ¶ 2; Adkins Decl. ¶ 2; Norell Decl. ¶ 2; Bonin Decl. ¶ 2.) The
9 government has also persuasively identified a number of sources, perhaps as many as
10 twenty-two, who have knowledge about the matters contained in the media reports, but
11 who are not bound by Rule 6(e)’s secrecy requirements. (Gov’t Opp. at 15.) This
12 evidence sufficiently rebuts any inference that government agents were the source of the
13 alleged leaks.

14
15 **Conclusion**

16 [REDACTED]

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18 DATED: November 7, 2008



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20 _____
21 CORMAC J. CARNEY
22 UNITED STATES DISTRICT JUDGE
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25 information subject to Rule 6(e)’s secrecy requirements and government work product in its ongoing
26 criminal investigation, Dr. Nicholas is not entitled to inspect the declarations to litigate his motion to
27 show cause. See *In re Grand Jury Proceedings (Doe)*, 867 F.2d 539, 540-41 (9th Cir. 1989). Dr.
28 Nicholas, however, will be afforded an opportunity to challenge the veracity of the AUSA Stolper’s
declaration if and when the grand jury returns an indictment against him. See *United States v.*
Zielezinski, 740 F.2d 727, 732 (9th Cir. 1984).